

liability where actions in conformance with the ordinary performance of a contract necessarily or naturally result in a nuisance. Tankersly v. Webster, 243 P.2d 745, 747 (Okla. 1925)(Plaintiffs' Motion and Brief, p. 21) This case is also without precedential value as the Tankersly court noted that the rule plaintiffs urge on this Court did not even apply in that case. Plaintiffs have failed to produce any Oklahoma case that applies the rule mentioned in Tankersly. Moreover, the Tankersly is further inapplicable because it, too, involved an abnormally dangerous situation, not an alleged nuisance or trespass.

For numerous reasons the plaintiffs' argument that this exception applies is misplaced. Case law and facts at hand demonstrate the following:

1. No Oklahoma case has applied the exception in the manner in which plaintiffs' urge on this Court. The only case from Oklahoma that plaintiffs' cite for a similar proposition is almost eighty years old, does not apply factually, and does not adopt the rule plaintiffs seek to impose upon the Poultry Defendants.
2. The Poultry Defendants were not aware until the 1990's that phosphorus presented potential problems to the Watershed; the Poultry Defendants then began implementation of measures to educate their contract growers about litter management issues and to prevent and abate phosphorus concerns. Even, plaintiffs admit that it was not until 1996 or 1997 that the Poultry Defendants became aware of potential problems presented by phosphorus. (Plaintiffs' Motion and Brief, p. 22) Plaintiffs' repeated and unfounded allegations that Poultry Defendants have known for decades about this problem are both erroneous and irrelevant, as they are only red herrings put forth to confuse the issue.
3. The Poultry Defendants have taken tangible, reasonable steps to restrict the amounts of phosphorus generated in the Watershed through land application operations within the limits allowed by their contracts with their growers. The fact of the matter is that the plaintiffs are so fixated on poultry operations that they will only be satisfied with the total cessation of all poultry operations in

the Watershed, an action that would not help the Water Supply in the short term, but would certainly be economically devastating to numerous independent contract growers who are not before this Court.

These facts in no way trigger the exception with which plaintiffs proselytize the Court. For all of these reasons, this Court should decline to apply the plaintiffs' proposed exception and, accordingly, the Court should deny the plaintiffs' Motion for Partial Summary Judgment on this issue.

## PROPOSITION II

### LAND APPLICATION OF LITTER DOES NOT CONSTITUTE A NUISANCE *PER SE*.

A. Plaintiffs' Legal Authorities Do Not Establish a Basis for the Court to Find as a Matter of Law that Land Application of Poultry Litter is a Nuisance *Per Se*.

1. Caselaw cited by plaintiffs does not establish that poultry litter is a nuisance *per se*.

Throughout their pleadings plaintiffs continually refer to manure and litter interchangeably as if they are the same substance, when that simply is not the case. However, because litter is a combination of manure and rice hulls or wood chips on an approximately 50-50 ratio, the two substances are quite distinct. Plaintiffs continuing referral to the substances as being equal is merely inflammatory, and erroneous.

Plaintiffs' cite three (3) cases for the proposition that animal manure (not poultry litter) has been found to be a pollutant. (Plaintiffs' Motion and Brief, p. 23) Those cases are: Concerned Area Residents for the Env't v. Southview Farm, 834 F.Supp. 1410 (W.D.N.Y. 1993)("CARE") reversed 34 F.3d 114; Carr v. Alta Verde Indus. Inc., 931 F.2d 1055 (5<sup>th</sup> Cir. 1991)(NPDES permit case); and, Higbee v. Starr, 598 F.Supp. 323 (E.D. Ark. 1984). However, CARE and Higbee are the only cases even remotely on

point regarding manure (not litter) as a pollutant. In each of these cases, the issue is the classification of liquid (not solid) swine waste that falls directly from swine contained in a Confined Animal Feeding Operation through floor "slats" and into holding lagoons without being mixed with any substance (e.g. rice hulls or shavings) to begin breaking down and diluting the nutrients contained in the waste. In each of the cases relied upon by plaintiffs for this proposition, the manure was not a solid, and was not mixed with any other substance to reduce or change its composition, making it potentially more susceptible to runoff. Here, plaintiffs are attempting to have litter equated to liquefied swine manure and/or attempt to treat litter the same as manure under the Clean Water Act and the cases cited in their Brief, which is simply not the case and is merely an effort to mislead the Court by clouding the issue with irrelevant comparisons. The two substances differ to such a fundamental extent that they cannot be considered equivalents for purposes of rhetoric or for application of case law.

2. Oklahoma Statutes cited by plaintiffs do not establish that poultry litter is a nuisance *per se*.

Plaintiffs' hope to convince the Court to trigger the public nuisance provisions of Oklahoma law based on invocations of statutory definitions which include manure (not poultry litter) as a pollutant. Plaintiffs' attempt is misplaced.

First, Title 27A, Section 2-6-105, in addition to the terms relied upon by the plaintiffs, further requires that where the Executive Director finds that water has been polluted he should order the pollution to cease or order actions intended to prevent the pollution in the future. 27A O.S. §2-6-105(B) In this matter the Executive Director has not made any such finding or order.

Moreover, as acknowledged by the plaintiffs, there is no conflict between section 27A and the general public nuisance law found in Title 50 of the *Oklahoma Statutes*. (Plaintiffs' Motion and Brief in Support, p. 25) Section 1.1 of Title 50 provides:

Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.

50 O.S. §1.1(B)

Here, the actions plaintiffs complain of do not constitute a nuisance. To date, it has not been established that the manner in which the contract growers handle their litter has (beyond mere allegations) a substantial adverse affect on public health or safety. As such, litter application in the Watershed and the alleged consequences of that application by the contract growers is reasonable and does not amount to a nuisance *per se*. Because the Poultry Defendants have not allowed manure to enter waters of the State of Oklahoma and because litter application practices of contract growers have always been consistent with good agricultural practices, land application of litter is not a nuisance *per se*.

### **PROPOSITION III**

PLAINTIFFS HAVE FAILED TO SHOW THAT THE POULTRY DEFENDANTS ARE LIABLE AS A MATTER OF LAW FOR VIOLATING STATUTES REGARDING THE POLLUTION OF A MUNICIPAL WATER SUPPLY.

Plaintiffs failed to show that the Poultry Defendants are liable under the "normal and expected contract operations" exception to the general rule that there is no liability for an employer of an independent contractor, or that the "abnormally dangerous activities" exception applies. Plaintiffs have failed to show that litter (not manure) is

considered by any of the authorities (e.g. CWA, RCRA, case law, and/or statutes) to be a pollutant or otherwise considered to be a hazardous substance. Plaintiffs have also failed to show that the agriculture practices engaged in by the contract growers in the Watershed are not consistent with good agricultural practices. As such, plaintiffs' failed to show that there is no genuine issue regarding each of those facts and, accordingly, they are not entitled to judgment as a matter of law as to any of them.

### **POULTRY DEFENDANTS' MOTION TO STRIKE**

Alternatively to denying Plaintiffs' Motion and Brief, the Poultry Defendants assert that because the plaintiffs have not raised this theory of the case at any time prior to this Motion, this Motion should, in the interest of not rewarding unfair surprise and in the interests of fair play and substantial justice, be stricken in its entirety.

Rule 12(f) of the Federal Rules of Civil Procedure states in pertinent part as follows:

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or ... upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f) (Supp. 2000)(emphasis added).

Rule 12(f) provides a court the impetus to strike, either by its own initiative or upon proper motion, redundant, immaterial, impertinent, or scandalous information contained in any pleading or to strike the pleading in its entirety. A Rule 12(f) Motion does not challenge the pleading on its face, but merely challenges the timeliness, relevance and / or materiality of information contained in the pleading. The motion may be used to strike allegations or information in the pleading that do not help understand the plaintiff's claim for relief and/ or do not perform some other useful purpose in promoting the just disposition of the litigation.

See Wright & Miller "Federal Practice & Procedure" § 1380-1382. In addition, Rule 12(f) motions are used to challenge allegations and information contained in the pleading that are unworthy of consideration by the court because they are so unrelated to the plaintiff's cause of action that it would be unnecessary, burdensome, or unjust to require a defendant to respond.

Via their Motion and Brief, plaintiffs for the very first time, just two months out from trial, present a radically different theory of the case from that which they have relied on or disclosed to date. Until the plaintiffs filed their Motion and Brief they have relied solely upon their contention that the Poultry Defendants exercise so much control over their contract growers that the contract growers are not actually independent contractors but are agents of the Poultry Defendants. This assertion was the basis of their theory of liability in their original Complaint and in their Amended Complaint. (See generally: Complaint, ¶¶ 17-22 & Amended Complaint, ¶¶ 17-22)

Now, apparently recognizing flaws in their argument, plaintiffs attempt to change course and assert a new and dramatically different theory of liability. They did not choose to assert this theory of liability until they filed the instant Motion, after depositions and discovery were completed or near completion, and thus the theory has not been investigated during the discovery process. If plaintiffs had disclosed this theory of liability at an earlier juncture then it would have drastically altered the Poultry Defendants discovery process, theories of the case, and defense strategy. Additionally, plaintiffs' new theory would have required additional discovery regarding the scientific aspects of the argument and the validity inquiries into the remote authorities relied upon by the plaintiffs regarding their argument.

In short, plaintiffs ambushed the Poultry Defendants with a new theory of liability that Poultry Defendants cannot properly defend against because discovery is closed. For these reasons, the Poultry Defendants request that this Court strike plaintiffs' Motion and Brief pursuant to Rule 12(f) of the *Federal Rules of Civil Procedure*.

### CONCLUSION

Plaintiffs have failed to show that there is an absence of material fact with regard to the alleged liability of the Poultry Defendants. Plaintiffs did not establish the normal and expected contract operations exception to the general rule that there is no liability for the acts of independent contractors. Plaintiffs failed to prove that litter (not manure) is a pollutant or hazardous material, beyond mere broad allegations. As such, the Poultry Defendants are not liable as a matter of law under any of the theories presented by the plaintiffs in their Motion and Brief. In the alternative, because the theory of recovery presented by the plaintiffs is radically different than any theory asserted to date, the Poultry Defendants request that the Court strike plaintiffs' Motion and Brief in its entirety.




WHEREFORE, PREMISES CONSIDERED, the Poultry Defendants respectfully request that this Court deny Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure or, in the alternative, that the Court will grant the Poultry Defendants' Motion to Strike Plaintiffs' Motion and Brief for Partial Summary Judgment Against Poultry Defendants on Issue of Liability for Growers' Disposal of Poultry Manure, and they further request any and all other relief to which they may be entitled.

By:

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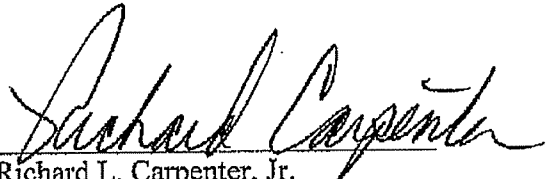
Attorneys for George's, Inc. and also  
signing by consent of other Defendants



**CERTIFICATE OF SERVICE**

This is to certify that I have on this day served counsel for all parties in the foregoing matter with a true and correct copy of this pleading by depositing in the United States mail a copy properly addressed with adequate postage thereon.

DATED this 27<sup>th</sup> day of November, 2002.

  
Richard L. Carpenter, Jr.

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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

2

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2. THE CITY OF TULSA  
THE TULSA METROPOLITAN  
UTILITY AUTHORITY,

4

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Plaintiffs,

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vs.

Case No. 01 CV 0900B(X)

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## APPEARANCES

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(918) 592-3390 FaxFOR THE DEFENDANT,  
CARGILL, INC.MS. LINDA C. MARTIN  
Doerner, Saunders, Daniel  
& AndersonFOR THE CITY OF  
DECATUR, ARKANSAS

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22 A. Tuesday.  
23 Q. Okay, sir.  
24 A. Last Tuesday.  
25 Q. About how long did you spend there?  
0005  
1 A. Probably two hours.  
2 Q. Who all was present besides Mr. McDaniel?  
3 A. Janet Wilkerson.  
4 Q. Anyone else?  
5 A. No.  
6 Q. Okay. Are you employed by Peterson in any respect?  
7 A. On a limited part-time basis.  
8 Q. And what is your title or -- Tell me about that  
9 part-time basis.  
10 A. The title is probably somewhat misleading. I was  
11 hired beginning of February, like I say, on a limited  
12 part-time basis mainly to deal with water quality issues  
13 and environmental issues that -- and attend meetings that  
14 were having effect with the poultry industry for Peterson  
15 Farms.  
16 Q. So you are an employee of Peterson's?  
17 A. Part-time.  
18 Q. How many -- do you have regular hours?  
19 A. No, sir.  
20 Q. How many hours a week do you work in that capacity?  
21 A. Without going back and looking at the records, I  
22 doubt that I have worked a total of ten hours a month.  
23 Like I say, it's very limited.  
24 Q. Who do you report to in that capacity?  
25 A. Would be Janet Wilkerson.  
0006  
1 Q. And was this a job that was filled by someone else,  
2 to your understanding, before you were hired part-time?  
3 A. No, sir, not to my understanding.  
4 Q. Is this a -- a position that was created more or  
5 less when -- when they hired you?  
6 A. Yes.  
7 Q. And does it have an official title or name?  
8 A. I think they've got it listed as environmental  
9 employee, I believe is the way it's listed. Environmental  
10 issues maybe.  
11 Q. Okay, sir. And what is your compensation  
12 arrangement for that job?  
13 A. It's an hourly fee.  
14 Q. And what is that?  
15 A. \$20 an hour.  
16 Q. When you were hired, what were your -- how were your  
17 duties explained to you?  
18 A. What we had discussed was that as water quality  
19 issues came up, as meetings came up pertaining to water  
20 quality or environmental issues, I would probably attend  
21 those meetings and bring that information back to the  
22 company and dispense that information to them. Usually  
23 that came back to Janet, and then they would take that  
24 information and do whatever they needed to, you know, and  
25 make their decisions with it.  
0007  
1 Q. And is your job limited solely to meeting with  
2 out -- in outside meetings or conferences or wherever  
3 water quality issues are the subject?  
4 A. That's the basics, yes. There will be some meetings  
5 that take place there at the office, but the majority of  
6 it has been travel meetings.

## COPY OF TRANSCRIPT

### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE CITY OF TULSA AND TULSA  
METROPOLITAN UTILITY AUTHORITY,

Plaintiff,

vs.

No. 01CV0900B(C)

PETERSON FARMS, INC.; TYSON FOODS, INC.;  
GEORGE'S, INC.; COBB-VANTRESS, INC.;  
CARGILL, INC.; SIMMONS FOODS, INC.; CITY  
OF DECATUR, ARKANSAS,

Defendants.

#### DEPOSITION OF WESLEY M. JARRELL

TAKEN ON BEHALF OF THE DEFENDANTS

ON NOVEMBER 5, 2002, BEGINNING AT 8:40 A.M.

IN TULSA, OKLAHOMA

#### APPEARANCES:

MR. KENNETH N. McKINNEY, Attorney at law, of The  
firm McKINNEY & STRINGER, 101 North Robinson, Suite 1300,  
Oklahoma City, Oklahoma 73102, appeared for the PLAINTIFF.

MR. JOHN ELROD, Attorney at Law, of the CONNER &  
WINTERS firm, Suite 200, 100 West Center Street, Fayetteville,  
Arkansas 72701-6081, appeared for the DEFENDANT SIMMONS  
FOODS.

REPORTED BY: KATHERINE A. POWELL, CSR, RPR, CRR

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WESLEY M. JARRELL - 11/5/02

17

1 Then when I went to Riverside in '66, they  
2 were in the middle of nitrate work down there.  
3 They were early, but then phosphorous faded out  
4 in the late '70s, nitrate came in and has been a  
5 fairly dominant issue for some time.

6 Now there's a realization, and I think in  
7 part it's because we have better tools for  
8 understanding phosphorous than we ever had in  
9 the earlier days.

10 Q What has happened in science that has  
11 given us better tools to understand phosphorous?

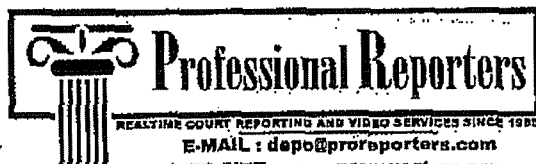
12 A Well, the way we've looked at it, at least  
13 in our program, is geographic information  
14 systems, for example, GIS lets you look at the  
15 whole landscape, understand elements of it like  
16 slope, land management, soil type, where the  
17 water is, how much is coming out.

18 Computer modeling has certainly been an  
19 element that's something that wasn't particularly  
20 available 20 years ago, 30 years ago.

21 Q From your viewpoint, Dr. Jarrell, in the  
22 last 20 years has there been a particular scientist  
23 who has been a crusader for phosphorous?

24 A Well, the name that pops up all the time  
25 is Sharpley.

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WESLEY M ARRELL - 11/5/02

1 number of those who will go into cash grains.

2 And a lot of those farmers value the  
3 nitrogen material and the phosphorous and the  
4 organic matter that they're getting out of the  
5 manure.

6 Q There's been a lot of talk in Oklahoma  
7 and Arkansas about something called a litter  
8 bank, which is nothing more than an informatio  
9 system for potential buyers and so on for chicke  
10 litter can come together, for instance. Is the sa  
11 sort of thing going on in Wisconsin in terms of  
12 dairy manure?

13 A That's a great idea. I haven't seen that  
14 level of development yet. My wife is actually  
15 working on some approaches that are similar to  
16 that in trying to get people who produce organic  
17 waste materials of all kinds to join together and  
18 try to create value-added products that are real  
19 beneficial.

20 Q Is there an equivalent of a phosphorou  
21 index in the Wisconsin regulatory scheme?

22 A Right. The 590 standard has a  
23 phosphorous index.

24 Q And that's actually in play right now in  
25 Wisconsin?

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WESLEY M. JARRELL - 11/5/02

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1 A It's not -- when the 590 standard becomes  
2 in effect, it will be in play. But that's -- initially,  
3 it was anticipated it would be this year, but it  
4 looks like it's pushed forward a couple of years.

5 Q Are there any other standards, other than  
6 a phosphorous index, that would tell a farmer  
7 whether or not he or she can apply animal manure  
8 to a particular field?

9 A Right. The way the 590 was written this  
10 round, it also includes a soil test phosphorous  
11 option.

12 Q Is that in play yet?

13 A No. Neither one are because the 590  
14 isn't.

15 Q So right now it's totally laissez-faire?

16 A It is. It is. Yeah, as far as I'm aware,  
17 it's nitrogen-based still, which is the old  
18 standard.

19 Q But there is, then, some regulation that  
20 could prohibit a farmer from applying to a  
21 particular field animal manure?

22 A If -- when the 590 standard, if it gets  
23 inserted into the Department of Ag regulation, it  
24 would be.

25 Q So it's still something yet to come?

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WESLEY M. ARRELL - 11/5/02

1 A That's correct. But there's an anticipa  
2 date that looks relatively firm. The 590 was in  
3 process when the last set of rules went through,  
4 so it wasn't yet finalized. And they were not --  
5 did not want, for good reason, to accept something  
6 that wasn't finalized as the standard.

7 So our ideal is to work the next two year  
8 very hard to get the phosphorous index more  
9 validated over a wide range of areas and tested to  
10 determine if it's doing its job.

11 Q Is there general acceptance among the  
12 agricultural community that it is time to start  
13 dealing with these kinds of issues?

14 A I would characterize it as reluctant  
15 acceptance in many cases.

16 Q That's a good term. I like that.

17 A It's not embraced fully, but there's a  
18 realization that it's coming and that the best way  
19 to deal with it -- and that's what Discovery Farms  
20 are trying to do, I think, is to get out ahead of it  
21 and be able to say this is what is happening on  
22 the farm and this is what's happening with the  
23 environment, and these are the benefits and cost  
24 of the BMP's, for example, that you're asking us to  
25 do, or sometimes telling us to do.

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1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE NORTHERN DISTRICT OF OKLAHOMA

3   THE CITY OF TULSA, and THE                   )  
4   TULSA METROPOLITAN UTILITY                )  
5   AUTHORITY,                                    )

                                  Plaintiffs,                    )

6                   vs.    )

Case No. 01-CV-0900-B(C)

7   TYSON FOODS, INC.,    )  
8   COBB-VANTRESS, INC., PETERSON                                )  
9   FARMS, INC., SIMMONS FOODS, INC.,                            )  
10   CARGILL, INC., GEORGE'S INC.,                                )  
11   and THE CITY OF DECATUR, ARKANSAS,)                            )

12                                   Defendants.                        )

13                   THE DEPOSITION OF BILLY B. TUCKER, Ph.D.,

14   taken on behalf of the Plaintiffs, pursuant to  
15   agreement of the parties, on the 14th day of November  
16   2002 at the law offices of Rhodes, Hieronymus, Jones,  
17   Tucker & Gable, 400 ONEOK Plaza, Tulsa,  
18   Oklahoma, 74103, before Elizabeth Roy Rockett,  
19   Certified Shorthand Reporter in and for the States of  
20   Oklahoma and New York.

21                   A p p e a r a n c e s

22   For the Plaintiffs:           MR. KENNETH N. MC KINNEY, ESQ.  
23                                   MR. ROBERT L. ROARK, ESQ.  
24                                   McKinney & Stringer  
25                                   Suite 1300  
                                  101 North Robinson  
                                  Oklahoma City, Oklahoma

EXHIBIT

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1 of crops and it ought to be recycled and used.

2 Q. In a form that doesn't hurt water supplies?

3 A. Yes.

4 Q. Do you, even though you would say it differently, can  
5 you see that this is a statement that a competent scientist  
6 could make?

7 A. They did.

8 Q. The next paragraph starts out saying, "Several states  
9 have proposed standards that would limit manure  
10 application..." and so forth. It goes on to say standards  
11 may be based on nutrient utilization where manure is  
12 applied to meet phosphorus required for crop production.  
13 First, do you think that's accurate and correct?

14 A. Yes.

15 Q. It goes on to say, "Standards based on waste disposal  
16 exceed nutrient phosphorus crop requirement and allow for  
17 some buildup of soil phosphorus. Do you think that's  
18 correct?

19 A. I really don't understand the sentence standards based  
20 upon waste disposal exceed nutrient P crop requirement or  
21 the standards do allow for some buildup of soil. That's  
22 correct.

23 Q. If an application is in excess of plant needs, then  
24 it's being called here a waste disposal rather than a  
25 beneficial use?

1 A. Runoff from water?

2 Q. Runoff water, yes.

3 A. You can get runoff from water, but I don't think you  
4 carry the material. It's all the way to the creek.

5 Q. You don't?

6 A. Not generally.

7 Q. Let's say people think the weather is going to be nice  
8 and dry. You see how they spread this dusty, dry chicken  
9 manure on the field, haven't you?

10 A. Yes.

11 Q. You just take a truck and kind of spread it around.  
12 You've seen it blow around and everything else when they're  
13 applying it; does it not?

14 A. I haven't seen it -- I have seen it, you know, the  
15 dust blow out from it. But the manure itself dropped to  
16 the ground when I saw it.

17 Q. So if the weatherman happens to be wrong that week and  
18 a few days later if there's a pretty good rainfall, then  
19 why is it that the runoff is not going to carry with it  
20 some of that soluble feed that's been put right on top of  
21 the soil?

22 A. Over the soluble P?

23 Q. Yes, sir.

24 A. I thought you were talking about the P in the --

25 Q. The high STP in, down in the soil itself?

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA

3 THE CITY OF TULSA, THE )  
4 TULSA METROPOLITAN )  
5 UTILITY AUTHORITY, )

6 Plaintiffs, )

No. 01 CV 0900B(X)

7 vs. )

VIDEOTAPED  
DEPOSITION OF

8 TYSON FOODS, INC., )  
9 COBB-VANTRESS, INC., )  
10 PETERSON FARMS, INC., )  
11 SIMMONS FOODS, INC., )  
12 CARGILL, INC., GEORGE'S, )  
13 INC., CITY OF DECATUR, )  
14 ARKANSAS, )

RONALD J. MULLIKIN

15 Defendants. )  
16 ----- )

COPY

17 THE VIDEOTAPED DEPOSITION OF RONALD J.  
18 MULLIKIN, taken before Karen J. Eichmann,  
19 Certified Shorthand Reporter and Notary Public  
20 of the State of Iowa, commencing at 12:02 p.m.,  
21 on the 18th day of July, 2002, at 421 West  
22 Broadway, Suite 405, Council Bluffs, Iowa.

23  
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25

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EXHIBIT

4

ke (VIDEOTAPED DEPOSITION OF RONALD J. MULLIKIN)

1 regional sales manager.

2 Q. Where was your store as assistant  
3 manager?

4 A. I was in Cross Lanes, West Virginia;  
5 Freehold, New Jersey; Waterloo, Iowa.

6 Q. Then why did you leave them and go to  
7 Peterson?

8 A. Well, I left them for health reasons  
9 and because I wanted to live back in northwest  
10 Iowa. I didn't leave -- or northwest Arkansas.  
11 I didn't leave them because I wanted to go to  
12 work for Peterson. I left them really without  
13 having another job to go to and just took a  
14 short sabbatical and then found the position at  
15 Peterson.

16 Q. And started with Peterson when?

17 A. I believe it was in November of I  
18 believe it was '97.

19 Q. And when did you leave Peterson?

20 A. Would have been in August of 2000, and  
21 I think those dates are close.

22 Q. Then you left Peterson and went back  
23 with Wal-Mart.

24 A. That's correct.

25 Q. What's the reason that you left

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1 of the divisions to the other.

2 Q. And you anticipate your position back  
3 in the home office will be what?

4 A. Most likely with Sam's Club. There's a  
5 couple of different things that we are  
6 negotiating on right now. I don't know exactly  
7 which position it will be that they finally put  
8 me in.

9 Q. So you can't tell me what your function  
10 will be then?

11 A. No.

12 Q. How would you rate your tenure with  
13 Peterson Farms as far as job satisfaction and  
14 things of that sort?

15 A. I enjoyed it. I especially enjoyed the  
16 environmental side of it, and I think it's  
17 because of my agricultural roots. Enjoyed the  
18 human resources part of it also. And the part  
19 that I was originally hired for, which was to be  
20 the director of training, I got to the point  
21 where we had people trained that did most of  
22 that; and I wasn't nearly as involved with it.

23 Q. So after that point you moved more into  
24 the environmental side?

25 A. Uh-huh.



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1 Q. Did you actually pick up an  
2 environmental title at that point?

3 A. I had the title of director of  
4 environmental affairs.

5 Q. From inception or later on?

6 A. No, later on.

7 Q. So at first director of training?

8 A. Uh-huh.

9 Q. And then after how long?

10 A. I would have said that it would be  
11 probably six to nine months.

12 Q. So sometime you are thinking in mid or  
13 so 1998, you're named director of environmental  
14 affairs, did you say?

15 A. That became -- that became more of what  
16 I did. My involvement with the environment  
17 started out with being asked to simply attend a  
18 meeting and come back and report on what my  
19 feelings were. As I gained a better  
20 understanding of it and I think their comfort  
21 level with what I was doing and seeing grew,  
22 that is when they said to go ahead and dedicate  
23 more time to that.

24 Q. Was there a function in the company  
25 with that title before?

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1 area once you took over?

2 A. Uh-huh.

3 Q. Did those people report to you for  
4 environmental issues?

5 A. No. On many occasions I went to them  
6 for help just because I don't have a background  
7 in the poultry industry.

8 Q. But you did coordinate and work  
9 together with them after you became the  
10 director?

11 A. Yes.

12 Q. How would you describe Peterson Farms  
13 insofar as a commitment to environmental issues?

14 A. I would say that it was a huge concern.

15 Q. From the first when you became familiar  
16 with it?

17 A. I would have to say so or they wouldn't  
18 have put me in that position and started sending  
19 me to those meetings.

20 Q. What was the first meeting that you  
21 went to that you said sort of led to this  
22 assignment?

23 A. It was a meeting, and I don't recall  
24 the date, but it was a meeting at John Brown  
25 University. No, I take it back. It was at

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1 Simmons Foods that we attended in Siloam  
2 Springs.

3 Q. A meeting at the Simmons Food facility?

4 A. Uh-huh, with integrators. There were  
5 people there from the state of Arkansas. There  
6 were people there from the USDA, people from  
7 Oklahoma, people from the University of  
8 Oklahoma, OU.

9 Q. OSU?

10 A. Yes.

11 Q. Are you saying both OU and OSU?

12 A. Yes.

13 Q. Approximately when was that meeting?

14 A. I would have to -- and this is a guess.  
15 Let's say that it was probably in February or  
16 March of '98.

17 Q. Three or four months after you had been  
18 with the company?

19 A. Uh-huh.

20 Q. What was your understanding of the  
21 purpose of the meeting?

22 A. Was to discuss the growing issue of  
23 poultry litter and concerns over problems that  
24 it could be creating.

25 Q. Primarily problems in watersheds?

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1 A. Uh-huh.

2 Q. And was the Spavinaw watershed one of  
3 those areas that was being discussed?

4 A. I don't recall it being talked about  
5 specifically. There were a number of watersheds  
6 and a number of things that were discussed, and  
7 I don't -- I don't recall the total content of  
8 the meeting.

9 Q. What did you bring away from that  
10 meeting? What kind of knowledge or feeling  
11 about this area?

12 A. Mr. McKinney, my first feeling, if I  
13 remember correctly, was one of confusion  
14 because the ideas the people had, the  
15 perceptions is probably the best way to put it,  
16 no one could really substantiate. There was  
17 nothing really clear and decisive about what  
18 everybody was talking about.

19 Through my years in the  
20 fertilizer business, my understanding the  
21 properties and the way that phosphate, for  
22 instance, acts and reacts in the soil was  
23 somewhat different than what I was hearing at  
24 those meetings.

25 Q. What had been your understanding and --

29  
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1 again.

2 Q. What typ of soil would be able to  
3 sustain that type of phosphorus load?

4 A. I couldn't tell you.

5 Q. What impressions did you come out of  
6 this initial meeting at Simmons Foods with?

7 MS. BARTLEY: Object to form.

8 A. What I recall, once again, from that  
9 first meeting is one of almost confusion trying  
10 to understand what the problem was, what all the  
11 determining factors, what all the inputs were.  
12 And then I recall sitting down with Janet  
13 Wilkerson and us talking about what our role was  
14 or might be in the issues that were being spoken  
15 about.

16 Q. And Ms. Wilkerson's role was what, her  
17 function?

18 A. She was the vice president that I  
19 answered to. She was my direct report.

20 Q. What was her title? Vice president?

21 A. She was vice president of human  
22 resources.

23 Q. And in your training function, you had  
24 been reporting to her?

25 A. That's correct.

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1 annual litter from a typical broiler house of  
2 22,000 birds contains as much phosphorus as is  
3 in the sewage from a community of 6,000 people."  
4 Have you seen analyses and comparisons like  
5 that?

6 A. I have seen comparisons. I don't know  
7 if that number is correct or not.

8 Q. Would that surprise you to see that  
9 kind of a comparison?

10 A. The comparison wouldn't, but there's so  
11 many factors that go into it. I mean, that  
12 statement really simplifies it. The different  
13 feeds that they have has a tremendous impact on  
14 the amount of phosphate, for instance, what the  
15 ingredients are; and it's a pretty general  
16 statement.

17 Q. Would you look at page 4. I think it's  
18 the next page maybe, at the bottom talking about  
19 environmental impact. They first talk about  
20 spills directly into the water have an impact.  
21 It goes on to say, "In addition, the excessive  
22 growth and decay of algae and other aquatic  
23 organisms that feed on excessive nutrients in  
24 water deplete dissolved oxygen. The resulting  
25 hypoxia (low oxygen) from chronic nutrient

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1 enrichment can result in fish kills, odor and  
2 overall degradation of water quality." Do you  
3 agree with that statement, Mr. Mullikin?

4 A. Based on what I know, yes.

5 Q. Did you know that in February of 1998  
6 when you started this job?

7 A. Yes.

8 Q. Even then you knew that?

9 A. Yes.

10 Q. And looking on page 6 under human  
11 health concerns it talks about the aquatic  
12 ecosystems and then goes on to say, "But there  
13 are also human health concerns associated with  
14 animal waste pollution that should be studied  
15 further." Have you learned that that is  
16 true?

17 A. I would agree with that.

18 Q. And has that been discussed by any of  
19 the officers of Peterson Farms?

20 A. Not in discussions that I was in with  
21 them.

22 Q. Look on page 21, if you would please,  
23 which I think is a description of the parts of  
24 the Animal Agriculture Reform Act.

25 Incidentally, did Peterson support or fight this



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1 earlier, I take it?

2 A. Uh-huh.

3 Q. Were you requested to write a memo  
4 bringing people up to date?

5 A. At times. I don't recall if in this  
6 case I was; but at times Ms. Wilkerson would  
7 say, you know, why don't you shoot us something  
8 so that we all know where you are at and what  
9 all is going on.

10 Q. If we could look at the second  
11 paragraph of your memo, you say, "I personally  
12 have no opinion on whether or not the integrator  
13 or the grower owns the litter." Was this  
14 because you had heard the argument that we spoke  
15 about earlier that since the integrator owns the  
16 chicken and the feed and the bird, then it  
17 follows they really should own the litter too?

18 MS. BARTLEY: Object to form.

19 A. I think the statement there was one  
20 where I didn't feel equipped, didn't feel like I  
21 knew enough about everything that was going on  
22 to have an opinion about it.

23 Q. Okay. And then you go on to say, "I do  
24 feel, without any doubt, that as time passes, we  
25 the integrator will be found to be liable for it

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1 meeting?

2 A. The 300 pounds was an arbitrary number.  
3 It was a number that, once again, not based on  
4 science. It was a number that someone -- I  
5 don't recall if it was the NRCS. I don't recall  
6 if it was the extension service, whether it  
7 was -- I think in the state of Oklahoma it was  
8 mandated by legislation. But this 300 pounds  
9 was a number that was set forth so that -- as I  
10 state there, I believe there was only one  
11 Peterson farm grower that was able to write his  
12 plan because of that 300-pound threshold.

13 Q. Or apply any litter on his fields?

14 A. I would agree.

15 MS. BARTLEY: Object to form.

16 Q. Is that correct?

17 A. Yes.

18 Q. And you concluded that paragraph  
19 saying, "We need to continue to support anything  
20 we can to help our growers find ways to dispose  
21 of their litter." Do you firmly believe that?

22 A. Yes.

23 Q. By the time you left, had the company  
24 done anything to help its growers dispose of  
25 litter?